

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-150691
	:	TRIAL NO. B-1503243
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
LADON SMITH,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

This is an appeal of a conviction for felonious assault with a firearm specification. We affirm the judgment of the trial court.

At a jury trial, the state presented evidence that, during an altercation in a parking lot, Ladon Smith had fired a gun at Anthony Walker. The shot missed Walker and hit his car. Mr. Walker and his girlfriend ran away as Smith fired more shots into Walker's car. Mr. Smith then left the scene before police officers arrived. For his part, Mr. Smith conceded he had fired shots but maintained that he was firing at Walker's car, not Walker himself. At the conclusion of the trial, the jury found Smith guilty. The court sentenced him to six years for felonious assault and three years for the specification.

In his first assignment of error, Mr. Smith asserts that the court erred when it allowed into evidence recordings of calls he had made while locked up in jail. He

maintains that the calls were not relevant and that, if relevant, they were unduly prejudicial.

The calls' relevancy had two bases. First, under the state's theory, the calls suggested that Smith had intimidated witnesses not to appear at trial. *See State v. Soke*, 105 Ohio App.3d 226, 250, 663 N.E.2d 986 (8th Dist.1995) ("evidence of threats or intimidation of witnesses reflect a consciousness of guilt"). Second, the calls were relevant to the identification of Smith as the shooter. In one call, he describes Walker. As pointed out by the state, Mr. Smith would know what the victim looked like only if he had been at the scene. Mr. Smith counters that identity was not at issue in the trial: he admitted during his testimony that he had fired shots. But at the time the calls were played for the jury—during the state's case—identity had not been established.

Even though relevant, the court was still required to excluded the calls if their probative value was substantially outweighed by the danger of unfair prejudice. *See* Evid.R. 403(A). Mr. Smith complains that he was unduly prejudiced because the recordings let the jury know he had been incarcerated and because, at one point in the calls, he mentions he was also facing a domestic-violence charge. As to the fact of Smith's incarceration, any prejudicial impact was minimal. It could hardly have come as a great surprise to the jury that Smith was locked up while facing serious felony charges. And mention of the domestic-violence charge did little to additionally prejudice a jury that would soon hear Smith admit to deliberately firing shots at Walker's car. Further, the trial court instructed the jury that it was not to consider any other charges against Smith. Thus, we conclude that the recordings were of some probative value and that their admission presented only a minimal danger of unfair prejudicial impact. The court did not abuse its discretion when it allowed their admission. The first assignment of error is overruled.

Smith's second assignment of error is that the trial court erred when it denied his motion for a mistrial after the detective assigned to the case testified about Smith's prior domestic-violence charges. The detective mentioned the charges when discussing the jail calls made by Smith. Defense counsel's immediate objection was sustained by the court. In a later sidebar conference, defense counsel requested a mistrial, arguing that the state had not disclosed that there was a discussion of other charges in the calls.

We have already concluded that, in light of the curative instruction given by the court, Smith was not prejudiced by the disclosure of the domestic-violence charges. Accordingly, the court did not abuse its discretion when it denied the motion for a mistrial. The second assignment of error is overruled.

In his third assignment of error, Mr. Smith contends that the trial court erred when it gave the jury an instruction on flight. The court instructed the jury as follows:

Flight. Testimony has been admitted indicating that the defendant fled the scene. You are instructed that fleeing alone does not raise a presumption of guilt, but it may tend to indicate the defendant's consciousness of guilt.

Mr. Smith argues that there was not sufficient evidence to warrant the instruction. But "an instruction on flight as it relates to a defendant's consciousness of guilt is proper if there is sufficient evidence of escape or some affirmative attempt to avoid apprehension." *State v. Wood*, 1st Dist. Hamilton Nos. C-130413 and C-130414, 2014-Ohio-3892, ¶ 60. Here, the evidence that Smith left the scene while Walker and Evans were calling 911 and before police officers arrived was sufficient to warrant the instruction. See *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578. How much weight should be given Smith's departure from the scene was for the jury to

decide. The trial court did not abuse its discretion when it gave the instruction. The third assignment of error is overruled.

Smith's fourth assignment of error is that the trial court erred when it gave a *Howard* instruction to the jury. A few hours after beginning deliberations, the jury announced to the court that it was deadlocked. After receiving no objection from either the state or the defendant, the court encouraged the jury, pursuant to *State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989), to continue its deliberations to reach a verdict. Because Smith did not object to the *Howard* charge, he has forfeited all but plain error. *See* Crim.R. 52(B). Given the apparently short amount of time the jury had deliberated before it announced it was deadlocked, we conclude that the court did not commit plain error when it gave the *Howard* instruction. The fourth assignment of error is overruled.

In the fifth assignment of error, Mr. Smith argues that his conviction was not supported by sufficient evidence and that it was against the weight of the evidence. We disagree. In essence, he argues the evidence shows only that he was shooting at the car, not Walker. But both Mr. Walker and his girlfriend testified that Smith had shot at Walker. And Mr. Smith himself admitted to firing shots. We conclude that the state adduced substantial, credible evidence from which the jury could reasonably have concluded that the state proved beyond a reasonable doubt the elements of felonious assault. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. And in regard to the manifest-weight argument, our review of the entire record fails to persuade us that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse Smith's conviction and order a new trial. *See State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). It was for the jury to determine which version of the incident was credible. The fifth assignment of error is overruled.

In this final assignment of error, Mr. Smith asserts that the court erred as a matter of law in sentencing him. We disagree. The sentence was within the

applicable range for felonious assault. *See* R.C. 2929.14(A). And although the court did not place on the record its consideration of the purposes and principles of sentencing as guided by R.C. 2929.11 and 2929.12, we may presume that the court considered the proper sentencing factors absent a demonstration to the contrary. *See State v. Love*, 194 Ohio App.3d 16, 2011-Ohio- 2224, 954 N.E.2d 202, ¶ 14 (1st Dist.). Mr. Smith complains that the court did not inform him of the requirement that he submit to DNA testing. But R.C. 2901.07(B)(1) confers no substantive right. *See State v. Taylor*, 1st Dist. Hamilton No. C-150488, 2016-Ohio-4548, ¶ 6. And the failure to notify a defendant regarding DNA testing constitutes harmless error. *Id.* The final assignment of error is overruled, and we therefore affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DEWINE and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on November 30, 2016
per order of the court _____.

Presiding Judge